SUPREME COURT, U.S.
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Case No. 71-160

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LEVIN SERVICE CO., et al.,
Petitioners,

v.

DAVIDSON EXCAVATING, INC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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STATEMENT OF THE CASE

The Respondent submits the following "statement of the case" because the one submitted by Petitioners contains many conclusions which are dependent upon the view one decides to take about various disputed matters.

This law suit started because of a dispute between the parties as to how much material was provided and how much work was performed by the Respondent in constructing the site for a drive-in theatre near Cincinnati, Ohio. The original petition filed by Respondent was against all three Petitioners and claimed Twenty-Four Thousand Eight Hundred Thirteen and 60/100 Dollars ($24,813.60) for materials delivered to the site and Twenty-Five Thousand Four Hundred Thirty Dollars ($25,430.00) for grading and engineering services. The Petitioners denied that they owed anything.

It is undisputed that a written agreement was signed by Claude Davidson and Sam Levin that formed the basis for the first work done on a cornfield near Cincinnati, Ohio, in January, 1966. Controversies arose between the various parties almost immediately. A haul road had to be built so that trucks could drive from the highway to the area where the theatre was to be built. The location of the screen was changed several times. The work was not completed until August, 1966. Conflicting arguments have been made by all of the parties as to what developed during this eight month period of time.

The Petitioners have maintained that the quantity of fill dirt delivered to the site was to be determined by engineering surveys. The Respondent has maintained that this method was agreed upon at the start, used for a while, and then changed to one which called for an actual count to be maintained of truck loads delivered to the site. Likewise, disputes arose as to whether or not the Respondent performed certain duties at the request of the Petitioners in addition to the delivery of fill dirt.

The case was tried to a jury for two weeks. Both sides exerted every effort to establish the validity of their positions. A great deal of time and effort was devoted to the kinds of records maintained and to their accuracy as well as to the accuracy of various engineering surveys. At no time did any of the Petitioners move for an election to be made by the Respondent as to which of the Petitioners it was proceeding against.

The jury was charged upon all the issues made by the pleadings and returned a unanimous verdict for the Respondent in the sum of Thirty-Five Thousand Eighty-Eight and 65/100 Dollars ($35,088.65) against all three Petitioners. Interrogatories were answered by the jury which indicated that this verdict was based upon the full amount

being claimed for materials and certain itemized portions of the claims for labor.

Motions were filed by the Petitioners for judgment notwithstanding the verdict and for a new trial. One of the grounds urged by the Petitioners was that there was no basis for joint liability upon the part of the three original Defendants. These motions were considered by the trial court and overruled.

An appeal was taken to the Court of Appeals for Montgomery County and the judgment was reduced by Eight Thousand Three Hundred Fifty-Four and 44/100 Dollars ($8,354.44). This was the amount awarded by the jury for work performed beyond the value of the material delivered. This reduction was ordered because the evidence failed to show an intention to make a charge for these services at the time they were performed.

A motion for reconsideration was filed by Petitioners and was overruled.

Petitioners then filed a motion to certify the record in the Supreme Court of Ohio which was denied. A petition for rehearing was also denied.

Petitioners are now seeking to have this Court accept this case for review on the ground that they have been deprived of their right to due process of law.

ARGUMENT OPPOSING JURISDICTION

It is fundamental that the presence of a real and substantial federal question is essential to the jurisdiction of the Supreme Court of the United States over a judgment of the state courts.

Honeyman v. *Hanan,* 300 U.S. 14, 81 L. Ed. 476, 57 S. Ct. 350

California Water Service Co. v. *Redding,* 304 U.S. 252, 82 L. Ed. 1323, 58 S. Ct. 865

Petitioners argue in their brief that a federal question is presented here because the Ohio Court of Appeals used some language in its opinion that supported the finding of the trial court and also made a reference to "joint enterprise". They argue that this use of the words "joint enterprise" injected a new issue or theory into the case upon which the jury had not been charged.

We submit that this was not a new issue. The pleadings established that Respondent had filed suit against the three Petitioners. During the trial there was testimony from both Sam Levin and Louis Levin as to the roles they played in connection with this project as well as the offices they held in Levin Service Co. The Court of Appeals reviewed the entire record and pointed out (P. 24, Appendix, Brief of Petitioners) that there was testimony to support a finding that Sam Levin, Louis Levin and Levin Service Co. were jointly involved and were jointly liable.

Petitioners are attempting to put great stress upon the use of the words "joint enterprise" in the opinion of the Ohio Appellate Court. This seems to be an effort to manufacture an excuse for a further appeal of this case after every avenue has been used within the State of Ohio. It is without substance or foundation. The case has been fairly tried and appeals have been processed at every level available and at every level the Petitioners raised the issue of mutual joint liability. The state courts have consistently denied the arguments of the Petitioners.

This court has consistently held that it will not review judgments of state courts which rest upon adequate and independent grounds or non-federal grounds.

32 Am. Jur. (2) Federal Practice & Procedure #242

Herb v. *Pitcairn*, 324 U.S. 117, 89 L.Ed. 789, 65 S. Ct. 459

Holley v. *Lawrence*, 317 U.S. 518, 87 L. Ed. 434, 63 S. Ct. 394

CONCLUSION

The Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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